In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-2

ERNEST V. HORVATH and GEORGE A. HORVATH,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1958, the United States obtained judgment against Horvath Mills, Inc., for $1.7 million representing overpayments made by the United States to that corporation on various Korean-wartime contracts for the manufacture of tarpaulin. Subsequently, it discovered that Horvath Mills was insolvent as a result of the transfer of assets by that corporation, made at the direction of its officers and directors (the petitioners), to Masmo, Inc., and the petitioners.

In 1964, the United States brought suit in the district court as a judgment creditor of Horvath Mills, alleging that petitioners had improperly transferred the corporate assets of Horvath Mills in violation of New York law, and that petitioners therefore were liable to satisfy the government's judgment against Horvath Mills. Before trial, petitioners filed voluntary petitions in bankruptcy. The United States then obtained a default judgment against petitioners.

On June 12, 1970, more than forty days after judgment, petitioners moved in the district court pursuant to Rule 60(b), F.R.Civ.P., to set aside the default judgment on the ground of mistake and inadvertence or excusable neglect by their former counsel. The district court denied the motion (Pet. App. A1-A5), finding that "* * * the voluntary petitions were filed and the entry of judgment was not opposed with the expectation that the judgment would be 'washed out' in the bankruptcy proceedings * * *" (Pet. App. A4) and that petitioners' former counsel had "* * * pursued an intelligible, purposeful course of conduct * * *" (Pet. App. A5). The court of appeals affirmed (Pet. App. A6-A11).

The correctness of the narrow factual holding that, in the particular circumstances of this case, there had not been a sufficient showing to justify the reopening of the default judgment, does not warrant further review. The decision whether to reopen a default judgment lies within the discretion of the district court and, as the court of appeals correctly held (Pet. App. A7), there was no abuse of discretion here.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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